No. 79-481

In the Supreme Court of the United States

OCTOBER TERM, 1979

WILLIAM HANCOCK AND PAUL A. PALOMBI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 18-22) is reported at 604 F. 2d 999.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1979. A petition for rehearing was denied on August 24, 1979 (Pet. App. 23). The petition for a writ of certiorari was filed on September 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' indictments sufficiently charged the receipt of "kickbacks" in violation of 42 U.S.C. 1396h(b)(1).

2. Whether 42 U.S.C. 1396h(b)(1) is unconstitutionally vague.

STATEMENT

In separate proceedings in the United States District Court for the Northern District of Indiana, petitioners pleaded nolo contendere to one count of indictments charging receipt of kickbacks in connection with furnishing services to an individual for which payment is made by Medicaid funds, in violation of 42 U.S.C. 1396h(b)(1). Petitioner Hancock was sentenced to make restitution in the amount of $113.60 and to a one-year suspended sentence, with the provision that the first 30 days of that sentence be served in a jail-type institution. Petitioner Palombi was sentenced to make restitution in the amount of $716 within 30 days, to pay $5,000 in fines plus court costs within six months, and to a one-year suspended sentence with one year of probation. The court of appeals affirmed per curiam (Pet. App. 18-22).

The allegations of the indictments which are summarized in the opinion of the court of appeals (Pet. App. 19-20), asserted that petitioners Hancock and Palombi are doctors of chiropractic licensed to practice in Michigan and Indiana, respectively; that between 1973 and 1975 petitioners obtained blood and tissue specimens from their respective patients and sent the specimens to Chem-Tech Laboratory in Fort Wayne, Indiana, along with test request forms and billing information on the patients, containing Medicare and Medicaid recipient numbers where applicable; that Chem-Tech billed the state agency handling Medicare and Medicaid funds for its laboratory work on specimens from petitioners' Medicare or Medicaid patients; and that petitioners "did solicit and receive kickbacks from Chem-Tech * * * for referring Medicare and Medicaid recipients' blood and tissue specimens to Chem-Tech * * * for diagnostic testing."

ARGUMENT

1. Petitioners contend (Pet. 7-8) that their indictments are legally insufficient because the facts alleged therein do not constitute a violation of the "kickback" and "bribe" provisions of the Medicare and Medicaid statutes.[1] This claim is incorrect.

First, by entering a plea of nolo contendere, petitioners have admitted the facts as alleged in the indictment. See *United Brotherhood of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 412 (1947); *United States* v. *Michigan Carton Co.*, 552 F. 2d 199, 201 (7th Cir. 1977). Accordingly, they cannot be heard to assert (Pet. 6-7) that Chem-Tech's payments were legitimate "handling fees" for their services in drawing, packaging and forwarding the blood samples. The facts of the indictment, which must be taken as admitted, alleged that Chem-Tech's payments were solicited and received by petitioners in return, not

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[1] 42 U.S.C. 1395nn and 42 U.S.C. 1396h are similiar statutes delineating offenses and penalties under the Medicare and Medicaid statutes, respectively. At the time pertinent to these indictments, 42 U.S.C. 1396h(b)(1) provided:

> (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any—
>
> (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment * * *
>
> shall be guilty of a misdemeanor * * *.

for "handling" the specimens, but for "referring" them to the laboratory. The court of appeals therefore correctly concluded that the indictment alleged corrupt payments to petitioners, and that, in view of this element of corruption, the allged payments constituted "kickbacks" within the meaning of the statute.

Petitioners err in contending (Pet. 7-8) that the decision below conflicts with *United States* v. *Zacher*, 586 F. 2d 912 (2d Cir. 1978). Indeed, the decision below expressly agreed with the court in *Zacher* that the term "kickback" include some element of corrupt payments. The payments involved in *Zacher* were very different from the payments involved here,[2] and, in contrast to the decision below, the Second Circuit held that the evidence did not establish that the payments to Zacher were corrupt.

Petitioners also contend that the decision below conflicts with *United States* v. *Porter*, 591 F. 2d 1048 (5th Cir. 1979). In *Porter*, which like this case involved payments by laboratories to physicians, the court held that the evidence at trial did not establish that the payments were kickbacks within the meaning of the statute. The court relied on the Second Circuit's views in *Zacher*, but also concluded that "[i]n ordinary parlance, a kickback is the secret return to *an earlier possessor* of part of a sum received." 591 F. 2d at 1054 (emphasis in original).

The court below correctly distinguished (Pet. App. 21) *Porter* on the ground that that case "was an appeal after a trial in which the government introduced its evidence in

[2]In *Zacher*, the proprietor of a nursing home accepted Medicaid patients only if they paid him $4 per day in addition to his $25 per day reimbursement from Medicaid. The court held that that was not acceptance of a bribe or kickback under 42 U.S.C. 1396h(b).

support of the corruption or breach of any duty * * *. Here, in contrast, we review only the sufficiency of the indictments themselves."

Although the narrow definition of "kickback" offered by the Fifth Circuit in *Porter* seems inconsistent with the decision below, that inconsistency does not warrant this Court's review. First, we think it plain that the Fifth Circuit's definition of "kickback" was incorrect. In common parlance, a "kickback" usually refers to the receipt of money by a person (usually an agent, public or private) who has the ability to influence the disbursement of funds belonging to other persons or entities (often funds belonging to the agent's principal, but in this case Medicaid funds belonging to the federal government). Neither ownership nor "possession" of those funds by the recipient of the "kickback" is an essential—or even usual—feature of the concept (see Pet. App. 21).[3]

More importantly, the statutory language in question was amended in 1977 to leave no possible doubt that the kind of payments petitioners received are prohibited kickbacks. Thus, even if the rationale of *Porter* is inconsistent with the ruling here, this inconsistency is of little continuing significance. The 1977 clarifying amendment to 42 U.S.C. 1396h(b)(1) punishes "[w]hoever solicits or receives any *remuneration* (including any kickback, bribe, or rebate) * * * in return for referring an individual to a person for the furnishing * * * of any * * * service reimbursible under Medicare" (emphasis added). Pub. L. No. 95-142, Section 4(b), 91 Stat. 1181, 42 U.S.C.

[3]The Fifth Circuit's definition might more appropriately fit the term "rebate," which has a quite different meaning from the term "kickback."

(Supp. I) 1396h(b)(1)(A). In view of this expanded statutory definition, there is no need for this Court to resolve any conflict between *Porter* and this case.

2. Petitioners also contend (Pet. 12-14) that 42 U.S.C. 1396h(b)(1) is unconstitutional because it is vague and because it omits intent as an element of the crime.

Petitioners err in claiming that the statute does not require proof of intent. As the court of appeals concluded (Pet. App. 22), the term kickback requires that the recipient intended to solicit and receive the payment for a corrupt purpose. Nor did the statute fail to give petitioners fair notice that their conduct was forbidden. As the court of appeals found (Pet. App. 22), the term kickback has a commonly understood meaning, *viz.*, the receipt of money for a corrupt purpose. Thus a person of ordinary intelligence can clearly distinguish between the statute's prohibited receipt of money and the innocent receipt of money for services performed—what petitioners term "handling fees." See *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162-163 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

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